



**To: Multistate Tax Commission**

**From: Wood Miller, Uniformity Committee Chair**  
**Richard Cram, Sales & Use Tax Uniformity Subcommittee Chair**  
**Robynn Wilson, Income & Franchise Tax Uniformity Subcommittee Chair**

**Re: Uniformity Committee Annual Report to the Commission**

**Date: July 21, 2015**

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The commission develops model state tax laws for states to consider adopting. Proposed model laws may be suggested by our executive committee, a standing committee, one or more states, a taxpayer or taxpayer group, or any other member of the public. Once the committee has identified a model to develop, initial drafting takes place in subcommittees or workgroups. Richard Cram, Kansas Department of Revenue, chairs a workgroup to draft a model sales and use tax nexus statute. Mr. Cram also chairs a membership/industry workgroup to address private litigation involving transaction tax under- and over collection. Michael Fatale, Massachusetts Department of Revenue, chairs a workgroup drafting model Article IV (UDITPA) Section 17 market sourcing regulations. Jennifer Hays, Kentucky Legislative Research Commission, chairs a workgroup drafting model Article IV (UDITPA) Section 1 "receipts" regulations. All meetings and calls of the committee, subcommittees, and workgroups are public and public participation is encouraged.

Through June 30, 2015, the committee and subcommittees have met three times in person— in July 2014 in Albuquerque, NM, in December 2014 in Nashville, TN, and in March 2015 in Kansas City, MO. The committee met several times by teleconference and drafting workgroups have met regularly by telephone.

The members and leadership of the Uniformity Committee would especially like to thank Robyn Wilson, Alaska, for her service to the committee and the Income and Franchise Tax Subcommittee, which she has chaired for a number of years. Robyn has stepped down as chair effective July 1, 2015.

### **Projects by Status**

Currently before the Commission:

- Recommended Amendments to the Formula for the Apportionment and Allocation of Net Income of Financial Institutions
- Recommended Amendments to Section 18 of the Article IV [UDITPA]
- Recommended Conforming Amendments to Article IV [UDITPA]

Under Development or consideration at the Uniformity Committee and Subcommittees:

- Model Sales and Use Tax Nexus (Engaging in Business) Statute
- UDITPA Sec. 17 Market Sourcing Model Regulations
- UDITPA Sec. 1 "Receipts" Model Regulations
- Model Provisions Concerning Class Action and False Claims – Model Whistleblower Statute
- Possible Project on Federal Adjustments

## **Project Summaries**

### **Before the Commission**

- *Recommended Amendments to the Formula for the Apportionment and Allocation of Net Income of Financial Institutions*

In 2007, a workgroup was charged with reexamining the Commission's 1994 model statute for the apportionment of income realized by financial institutions, and recommending amendments to the subcommittee. These changes were caused both by the deregulation of the industry as a result of the repeal of Glass-Steagall, and by technological innovations that allow financial institutions to provide a full range of services, such as mortgage loan and credit card application processing, credit approval and account servicing, entirely online. The workgroup, which includes representatives from several states and the banking industry, identified revisions that are needed to the current MTC financial institutions model. The revisions include, among other things:

- clarifying the property factor rule for sourcing loans (currently based on SINAA – solicitation, investigation, negotiation, approval and administration);
- creating new receipts factor rules for sourcing ATM fees, merchant discounts, and trust account fees; and
- revising the receipts factor rule that requires use of “cost of performance” for sourcing any receipts not otherwise specified.

The subcommittee agreed with the workgroup's conceptual recommendations for making these improvements, and directed the workgroup to draft amendments accordingly. The workgroup completed a draft of recommended changes to the receipts factor and certain definitions, which the subcommittee has reviewed, amended, and preliminarily approved. The workgroup then began work on the property factor and the use of SINAA for sourcing of loans. At its July 2013 meeting, the subcommittee directed the workgroup to move forward with the approach of the property factor being real and tangible personal property and eliminating any aspect of SINAA from the property factor. In December 2013, the subcommittee completed its work on the property factor. At the meeting of the Executive Committee held December 12, 2014, the Committee approved the Proposed Draft Amendments to Formula for the Apportionment and Allocation of Net Income of Financial Institutions (without accepting a proposed revision by the Hearing Officer). The staff of the Commission subsequently sent out a Bylaw 7 survey to the states and a majority of the states responded that they would consider the proposed revisions. The proposed revisions are now on the agenda for the July 2015 Commission meeting.

- *Recommended Amendments to Section 18 of Article IV [UDITPA]*

The Commission's executive committee approved for public hearing the Uniformity Committee's draft amendments to Article IV (UDITPA) in December 2012, including one amendment to Section 18 (Subsection 18 (b)). Section 18 provides that if the allocation and apportionment provisions of the Article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax administrator may require the use of other methods. A public hearing was held on the draft amendments on March 28, 2013, with Professor Richard Pomp serving as the hearing officer. The hearing officer suggested four additional amendments to Section 18. The executive committee referred the hearing officer's report to the Uniformity Committee for its consideration. That committee subsequently declined to make the hearing officer's suggested amendments part of its draft amendments.

The Uniformity Committee's draft amendments were again presented to the executive committee at its meeting on May 8, 2014. The executive committee heard testimony in favor and

against the hearing officer's additional suggested amendments to Section 18. The committee voted not to recommend one of the suggested amendments (requiring the tax administrator to issue regulations in certain cases). It voted to recommend two of the other suggested amendments (before the Commission now as Subsections 18 (c) and (e)) substantially as written. It also voted to recommend a fourth suggested amendment (Subsection 18 (d)) conditioned on a modification that was asserted to be necessary by Uniformity Committee representatives. That fourth recommended amendment was referred back to the Uniformity Committee with instructions to make the modification as discussed. Subsequently, the executive committee's recommended amendments to Article IV, including the Uniformity Committee's amendment to Section 18 (Subsection 18 (b)), but excluding the recommended amendments in Subsections 18 (c), (d) and (e), were sent to the compact members as part of a bylaw 7 survey. A majority of Compact members responded to the survey that they would consider adopting the recommended amendments and consequently those amendments were placed on the Commission's agenda for its July 2014 meeting, and they were subsequently approved. The following day, the Executive Committee considered and approved the Uniformity Committee's modification to the recommended amendment in Subsection 18 (d). Subsequently, the recommended amendments in Subsections 18 (c), (d) and (e) were included in a second bylaw 7 survey. A majority of Compact members responded they would consider adopting the recommended amendments. These recommended amendments are now before the Commission.

- *Recommended Conforming Amendments to Article IV [UDITPA]*

The Commission's executive committee approved for public hearing the Uniformity Committee's draft amendments to Article IV (UDITPA) in December 2012, with the understanding that such amendments would necessitate conforming changes to Article IV if the amendments were ultimately adopted. A public hearing was held on the draft amendments on March 28, 2013, and the executive committee referred hearing officer report to the Uniformity Committee for consideration. On May 8, 2014, the executive committee's recommended amendments to Article IV were sent to the compact members as part of a bylaw 7 survey, again, with the understanding that such amendments would necessitate conforming changes to Article IV. A majority of Compact members responded to the survey that they would consider adopting the recommended amendments and consequently those amendments were placed on the Commission's agenda for its July 2014 meeting, and they were subsequently approved. Subsequently, the conforming amendments were submitted to the Compact members in a bylaw 7 survey and a majority of the members responded that they would consider adopting the amendments. These recommended conforming amendments are now before the Commission.

#### Before the Executive Committee

- **Model Sales and Use Tax Notice and Reporting Statute (tabled).**

This project is on hold pending the constitutional challenge to the Colorado use tax information reporting statute. At its March, 2010 meetings, the sales and use tax subcommittee initiated two projects related to sales and use tax education and enforcement: (1) a sales and use tax notice and reporting model, and (2) an associate nexus model (the associate nexus model is discussed below). The subcommittee determined it would work first on the sales and use tax notice and reporting model.

The resulting proposal requires sellers who are not collecting sales or use tax to notify purchasers of a potential tax liability at the time of sale if the product is to be delivered into the state. Sellers are also required to make annual reports to each such purchaser and an annual report to the state. De minimis exceptions and penalties are provided. The Uniformity Committee approved a draft in early March, 2011. Later that month, the executive committee approved the draft for public hearing. The hearing was held, and the hearing officer's report and recommendations were presented to the executive committee, which recommended approval of the proposal to the commission. The proposal

was not placed on the commission's agenda, however, because it had not passed the bylaw 7 survey at that point. The proposal came back before the executive committee in December, 2011, and clarifications were requested. The Uniformity Committee made those clarifications and the executive committee took the matter up again in May, 2012.

During that meeting, the executive committee voted to retain the proposal pending further discussion after the U.S. Court of Appeals for the 10th Circuit issued its opinion in *Direct Marketing Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013), and held that the federal Tax Injunction Act barred the Court from hearing the case. DMA filed a petition for certiorari in the U.S. Supreme Court on March 5, 2014. DMA also filed a separate action in the District Court for the City and County of Denver, which essentially tracks the issues in the federal action. On February 18, 2014, the state district court granted DMA's motion for preliminary injunction, staying the enforcement of the statute pending trial. The U.S. Supreme Court granted the petition for certiorari July 1, 2014 and rendered its decision on April 6, 2015, finding that the Tax Injunction Act did not bar the 10th Circuit from hearing the case. *Direct Mktg. Ass'n v. Brohl*, 135 S. Ct. 1124 (2015). The case was remanded for further proceedings and is now pending in the 10th Circuit after extensive supplemental briefing on the merits.

#### Under Development or Consideration at the Uniformity Committee and Subcommittees

- Sales and Use Tax Model Nexus ("Engaging in Business") Statute

Richard Cram, Kansas Department of Revenue, chairs this workgroup. A first draft of a proposed New York style "associate nexus" statute was presented during the Uniformity Committee teleconference in October, 2011. That draft largely followed so-called "Amazon" legislation first adopted in New York. A second draft was prepared for the July 2012 meeting that also largely followed the New York legislation and included aspects of the similar legislation adopted by California. The subcommittee has benefited considerably from comments and input by representatives from New York and California.

The subcommittee held a teleconference in October, 2012 which resulted in a third draft incorporating elements of the MTC affiliate nexus statute (which the Commission failed to adopt). This draft was reviewed and discussed during the December 2012 meeting. During that meeting, the subcommittee voted to expand the project to create a model sales and use tax remote seller nexus statute. A workgroup was formed that reviewed nexus research, developed a policy checklist, and identified state legislation that could serve as a template for the model. The workgroup met several times in 2013.

At the subcommittee's meetings in March, July and December 2013, the subcommittee reviewed the drafts prepared by the workgroup and returned them with suggested amendments. At its March, 2014 meeting, the subcommittee reviewed the draft prepared by the workgroup, but raised concerns that some of the provisions applied to more than just remote sellers. The subcommittee sent it back to the workgroup for further revisions.

A draft prepared by the workgroup and approved by the subcommittee was presented to the Uniformity Committee at its meeting July 2014. Additional changes were recommended regarding the model statute, which was returned to the workgroup. The workgroup presented its revised model to the subcommittee at the December 2014 meeting. At the December 2014 and March 2015 meetings, the Committee made additional changes and also sent the draft back to the workgroup. The workgroup has held additional phone calls refining the provisions and responding to the Committee's suggestions. The model was again before the Uniformity Committee at its meeting on July 28, 2015. (If approved in substantially the form presented, it is expected that the committee will present the draft model to the Executive Committee at its meeting on July 30, 2015.

- UDITPA Sec. 1 Workgroup – "Receipts"

Work on regulations to implement changes to Sec. 1(g) of Art. IV of the model Compact was begun November 6, 2014 and is continuing. . Jennifer Hays, Kentucky, chairs the group. The workgroup consists

of Donnita Wald, North Dakota; Steve Wynn, Idaho; Joseph DiNicola, Oregon; and Scott Fryer, Arkansas. Others have also participated in the workgroup. The workgroup has recently begun meeting weekly via teleconference for extended meetings, and plans to do so until the project is completed.

- UDITPA Sec. 17 Workgroup – Model Market-Sourcing Regulations

Work on regulations to implement changes to Sec. 17 of Art. IV of the model Compact was begun November 5, 2014 and is continuing. Michael Fatale, Massachusetts, chairs the group. The workgroup consists of Chris Coffman, Washington; Phil Skinner, Idaho; Aishah Hashmi, District of Columbia; Jeffrey Henderson, Oregon; Holly Coon, Alabama; Nirmal Dhaliwal, District of Columbia, and Ben Miller. Others have participated in the workgroup meetings. The workgroup meets weekly via teleconference, and plans to do so until the project is completed.

- Model Provisions Concerning Class Actions and False Claims - Model Whistleblower Statute.

This project began as an extension of the Model Provisions Concerning Class Actions and False Claims. The False Claims model was originally requested by the telecommunications industry. Industry representatives gave a presentation in July 2012 on issues arising from class actions for alleged over-collection of tax from communications customers. In December, 2012, after hearing input from COST and others, the project was expanded to include all industries, not just communications, and to include a look at false claims acts actions for alleged under-collection of tax. The subcommittee met with the litigation committee in February, 2013, to review a class action model recommended by the American Bar Association. In March, 2013, the subcommittee directed staff to provide an overview of state laws on class action and false claims acts in the state tax context. That research was reviewed by the subcommittee at its July 2013 meeting. An industry-state workgroup was formed. The workgroup focused on nuisance lawsuits, and in April 2014 the subcommittee considered a resolution endorsing the ABA Model Transactional Tax Overpayment Act. The subcommittee referred the resolution back to staff for further drafting. The draft was approved by the committee. The draft was then referred to the MTC Resolution Committee. That committee has recommended to the Commission that it adopt the resolution.

In the course of the workgroup's consideration of the issues involved in class action and false claims act cases with respect to state taxes, the group determined that there were situations in which states might benefit from whistleblower or false claims act processes for uncovering tax liabilities that would otherwise be difficult to identify. Staff reviewed potential solutions, and narrowed them to four options:

- (1) for the Commission to develop a model state tax whistleblower statute (the IRS model, IRC §7623);
- (2) for the Commission to develop a model state tax false claims act statute (the New York model);
- (3) for the Commission to develop both a model state tax whistleblower statute and a false claims act statute; or
- (4) to terminate the project.

At its May 7, 2015 meeting, the official guidance from the Executive Committee was to focus on the whistleblower portion at this time, in accordance with Option 1. The workgroup will proceed accordingly.

- Possible Project on Federal Adjustments

The Uniformity Committee has been asked by industry and practitioners to consider model statutory language that might simplify the filing of state tax adjustments triggered by federal and adjustments. The committee directed staff to consider the proposed project. Staff has reported that they have taken input from practitioners and reviewed the existing MTC model statute (which does not

appear to have been adopted by any states). Staff is also consulting with the FTA standards group on whether the issue might be addressed, at least in part, by a technology change in electronic filing requirements allowing filing information that would allow certain adjustments to be made more simply.